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HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 444

ARNAUD'S RESTAURANT, INC., ET AL.,
Petitioners,

versus

THOMAS P. COTTER, SR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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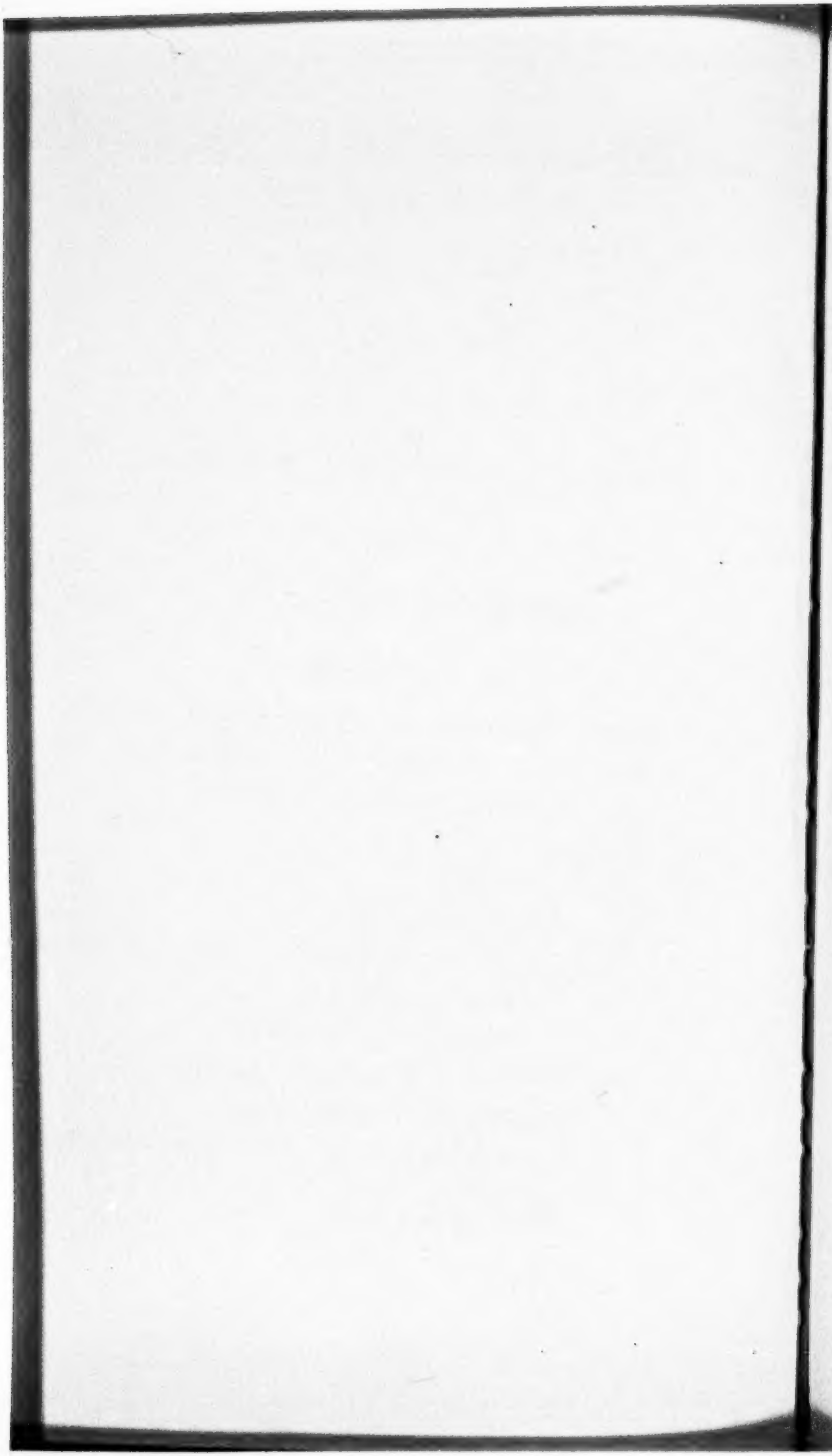

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ARNAUD'S RESTAURANT, INC., ET AL.,
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versus

THOMAS P. COTTER, SR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States of America:

The petition of Arnaud's Restaurant, Inc., and of London Guarantee and Accident Co., Ltd., appellants in the above entitled and numbered cause, respectfully represents:

1. That the opinion and decree rendered by the United States Court of Appeals for the Fifth Circuit on

May 20, 1954, under the Number 14,658 is erroneous, contrary to the law and the evidence, and prejudicial to the interest of petitioners, and the judgment should be reversed by this Court for the following reasons:

A. That a certified copy of the judgment rendered in the United States Court of Appeals for the Fifth Circuit on May 20, 1954, has been reported at 212 Fed. (2d) 883.

B. That this Court has jurisdiction of the subject matter hereof for the reason that it involves the judgment of the United States Court of Appeals for the Fifth Circuit, and is a suit by a citizen of Mississippi for more than $3,000.00 against a Louisiana corporation and its insurer.

C. That after rendition of the said judgment, on May 20, 1954, applications for rehearing were timely filed on June 8, 1954, and June 9, 1954. Thereafter the said rehearings were, on August 16, 1954, denied.

D. Under parts 1 and 5, jurisdiction on writ of certiorari, Rule 19 of the Revised Rules of the Supreme Court of the United States, this Court may at its discretion entertain this petition for certiorari.

   a. The award of the jury, for damages claimed to have been suffered in ingesting a piece of hard crab shell about as large as a half dollar, based only on circumstantial, hearsay evidence, is so large as to be entirely prejudicial. It shows the prejudice

of the jury, and threatens the virtual existence of half of the restaurants and places where food is distributed in the United States. The supplying of food to the citizens by restaurant is a matter of national interest.

b. The award of unduly excessive damages, without the positive proof of where and how such damages were occasioned, on a record which is based for recovery almost entirely upon hearsay and conjecture, particularly when the plaintiff himself never remembered having swallowed the crab shell which caused the damage or which he claimed caused the damage, that he never was conscious of swallowing it, that he had no idea where he had got it and particularly when it was a piece of hard crabshell the size of a fifty-cent piece, certainly should be the subject of consideration by this Court.

2. The United States District Court erred in not directing a verdict for appellant. There was never any direct evidence nor was there any circumstantial evidence in which the chain of circumstances was not broken which could ever have warranted a verdict for the plaintiff in the first instance.

3. The Court erred in not sustaining a motion for a judgment notwithstanding the verdict.

4. The Court, as a matter of law, erred in not holding that the doctrine of *res ipsa loquitur* would prevent recovery.

5. The Court erred in not allowing appellant to offer evidence for the purpose of meeting the issues on negligence on appellants' part.

6. The Court erred in not charging the jury that the burden of proof was upon the plaintiff in the cause to show that the crab shell which he claims he swallowed in eating pompano at Arnaud's Restaurant was actually swallowed by plaintiff at Arnaud's Restaurant and in permitting anyone else or the jury to determine that the plaintiff, who testified that he did not know where he had swallowed the crab shell in question, actually ingested it.

7. The Court erred in originally ruling that plaintiff could prove damages due to loss of earnings and in allowing the jury to hear that he had a loss of earnings.

8. The Court erred in not setting aside the verdict on the ground that it was so excessive as to show that the jury was prejudiced. The damages are so excessive that they amount to punitive damages. The *quantum* permitted to be recovered and which has been awarded by the lower Court and affirmed by the Court of Appeals is strictly in violation of the laws of Louisiana, which do not permit the allowance of rewarding beyond compensation the injured party and is in violation of and contrary to the jurisprudence in Louisiana which provides that, without a statute, punitive damages are not recoverable in Louisiana as was held in 1932 in the case of *McCoy v. Arkansas Natural Gas Company*, 143 So. 383, 175 La. 487, 85

A. L. R. 1147, Certiorari denied, 53 S. Ct. 220, 287 U. S. 661, 77 L. Ed. 570. This law, which prevails in Louisiana, forbids punitive damages.

9. The judge of the lower Court erred when he charged, as he did at Transcript 291, that, if the jury found for the plaintiff, the plaintiff would be entitled to have included in recompense as damages an amount for future pain and suffering and for permanent injuries and for loss of any of the plaintiff's physical functions and impaired health; when in the plaintiff's bill of complaint the only allegation of the plaintiff's petition, in paragraph 9 of Transcript, pages 8 and 9, the petition states: "that as a result of defendants' negligence, plaintiff suffered damages and injuries in the amount of $90,000.00; that plaintiff was required to pay medical expenses in the amount of $30,000.00." Nowhere did the plaintiff make claim for future damages, pain or suffering or for future impairment of his physical function.

10. The judge should not have left to the jury the decision of whether swallowing a piece of crab shell as large as a half dollar is contributory negligence. The Court should have instructed the jury that such an act was contributory negligence and should have barred recovery.

11. The Court of Appeals was in error in not deciding that the mere ingesting of a piece of hard crab shell by a plaintiff in a dish of soft food such as pompano en papillote was of itself contributory negligence; especially where the plaintiff himself testified he had no knowledge of where he ingested the crab shell as he did at Transcript 168, and that, as at Transcript 194, 195, he could not say he had ingested it at appellants' restaurant.

STATEMENT OF THE CASE.

The amended complaint alleged in substance that the plaintiff went to Arnaud's Restaurant in New Orleans, Louisiana, and was there served an order of pompano en papillote which, by reason of the negligence of the latter, contained a large, solid piece of crab shell which was a substance foreign to that dish; also that Arnaud's represented to the public that the food served was fit and proper for human consumption; that the plaintiff swallowed the piece of crab shell with results, detailed in the complaint, which caused him damages and injuries and expense. The answer of the defendants, Arnaud's Restaurant, Inc., and its insurer, London Guarantee and Accident Company, Ltd., raised the general issue and in the alternative alleged that the plaintiff was guilty of contributory negligence.

The appellee's cause of action is based on the fact that he purportedly entered the restaurant on the night of January 3, 1951, accompanied by his wife and two of her friends; that he ordered as a main course pompano en papillote. This he ate without having any knowledge at the time of having swallowed anything which was harmful. After returning to his hotel, he became ill, suffered from indigestion and continued to so suffer until 6:00 o'clock the next day when he called a physician who took him to Touro Infirmary. The preliminary diagnosis of his case was a possible coronary condition. Subsequently, on January 11, 1951, Dr. Kapian, one of his physicians, dislodged and eased from the rectum a sharp piece of crab shell approximately 2 or 3 centimeters in diameter. Thereupon he was given barium, and X-rayed.

It was determined that he had a perforated esophagus. He had four operations and was incapacitated for seven months. He made no complaint to ARNAUD'S until shortly before suit was brought approximately one year later. The appellant denied liability and contested the suit on the ground, first, that appellee had not obtained the crab shell at Arnaud's; second, that the crab shell was not the cause of the perforation of the esophagus; third, that if the crab shell was actually in the pompano en papillote it was through no fault or negligence of Arnaud's or its employees; and, fourth, that the appellee was guilty of contributory negligence in not discovering a crab shell in the pompano the size of the one which purportedly came from his anus.

At the close of the case the appellant moved for a directed verdict on the ground that the appellee had not proved that there was any negligence on the part of Arnaud's or its employees, but that, as a matter of fact, Arnaud's had shown (1) that it was impossible for the crab shell to have been obtained at Arnaud's in the pompano; (2) that the appellee could not possibly have swallowed the crab shell if he was using ordinary care in eating such a dish as pompano en papillote.

The Court had submitted the case to the jury upon four questions:

1. Did the crab shell which was taken from the anus of the appellee come from the pompano en papillote at Arnaud's?

2. Was the crab shell the cause of the injury suffered by the appellee?

Both of which were answered "yes".

3. If the crab shell came from the pompano en papillote, was not the appellee guilty of negligence in failing to detect the presence of the crab shell before he swallowed it?

This was answered "no".

4. What was the appellee's damage?

The jury found that the damage was $55,500.00.

The Court had reserved the question of a motion for a directed verdict, and the appellant immediately filed a motion for a judgment notwithstanding the verdict, and, in the alternative, for a new trial.

The Court overruled the motion for a judgment notwithstanding the verdict, but ordered a remittitur of $10,000.00 which the appellee agreed upon. From the verdict and judgment entered on the verdict in the sum of $45,500.00 the defendants appealed.

ARGUMENT:

A. THE VERDICT RENDERED IS EXCESSIVE.

The following Federal Court cases decided by a judge show how very excessive the verdict and judgment are:

Mayer v. Gulf Oil Corporation, 36 Fed. Supp. 773, a verdict of $26,500 was reduced to $6,500.00.

Allen v. Texas and Pacific Ry. Co., 96 Fed. Supp. 520;

The Aetna, 43 Fed. Supp. 303;
Bickley v. U. S., 77 Fed. Supp. 454;
Colerick v. U. S., 77 Fed. Supp. 953;
Marino v. U. S., 84 Fed. Supp. 721;
McCarty v. U. S., 88 Fed. Supp. 251;
McMullan v. U. S., 75 Fed. Supp. 164;
Jackson v. LaFollette Hardware and Lumber Co., 101 Fed. Supp. 916;
Bandy v. U. S., 92 Fed. Supp. 360;
Gladysz v. U. S., 100 Fed. Supp. 205.

Dr. J. Harvey Johnson, Jr., of Jackson, Mississippi, who performed the last operation on appellee and who, of course, testified on behalf of appellee, stated that appellee would not be disabled as far as his bodily functions were concerned, but that, from about October, 1951, he was able to eat and to go about (Tr. 140) and that,

> "I think he is able to carry on ordinary life without strenuous physical exertion except for relatively mild symptoms of burning, indigestion and gas." (Tr. 142).

We think that a very good discussion of the question of excessive verdicts will be found in the case of *Rice v. Union Pacific*, 82 Fed. Supp. 1003. In that case the injuries were not comparable, but the discussion by the judge on Pages 1006-1008, inclusive, is very material. The Court there says in summary that, although the verdict was neither shocking nor so excessive to be prejudicial, still that in applying a standard, the Court came to the

conclusion it was excessive, and that under the Federal Rules he had a right to grant a new trial unless a remittitur was accepted.

There is no reason why a person suing under the Tort Claims Act should receive $10,000.00 for pain and suffering and when a private individual is sued the plaintiff should receive $30,000.00 for comparable pain and suffering.

B. IMPOSSIBILITY OF OCCURRENCE.

And we come back to the testimony of the plaintiff himself:

Q. *Mr. Cotter do you remember having swallowed that crab shell?*

A. *No sir.*

Q. *Were you conscious of it?*

A. *No sir.*

Q. *Do you know where you got it?*

A. *I have no idea.* (Tr. p. 168).

Then Dr. Allan Goldman (T-89, 90, 91) who testifies that he was present when the history was given to Dr. Kaplan by the patient, testifies that he didn't remember anything about the man's statements of his activities prior to his having gone to Arnaud's for dinner. When plaintiff went to Arnaud's it was on January 5th, 1951 (his suit claims Jan. 3) 1951, (see Tr. 157 and Tr. 3, 7). When the case was tried it was June 8, 1953, *two years and five months after the man claimed he went into Arnaud's*

restaurant. All the testimony of these doctors is made without any notes, made in their own offices, and made entirely on their own recollections of two years and five months before! It is amazing and hard to believe that their memories can be so accurate after a lapse of so much time.

We come to the cross-examination of the plaintiff and on T-194, 195 we find:

Q. Now you had no idea at that time, as I take it, from the way you felt that you had swallowed anything?
A. No sir.

Q. *Did you chew the pompano as you ate it?*
A. *Yes sir.*

Q. *Never at any time while you were chewing the fish you felt anything that felt like a piece of crab shell?*
A. *I can't say that I did, sir.*

Think of it! A piece of crab shell almost as big as half a dollar!

Dr. Edward Allen John took the history, Transcript 217, 218: "Additional history at this date reveals a long history of dysphagia which has cleared somewhat during past month." Then on page 218, "dysphagia is a term which has to do with difficulty in swallowing, possibly pain, possibly distress, possibly inability to swallow food."

Then on pages 2, 3, 9 and 13 of the history of the patient taken by Dr. John are very significant.

Dr. Dan Silverman, a specialist in gastro-enterology, who had been actively in practice in this community since 1917, who was a member of, and is a member of the staff of Southern Baptist Hospital, Hotel Dieu, who belongs to the American Gastrological Association, and American College of Physicians, Southern Medical Association, Louisiana State Medical Society, Orleans Parish Medical Society, who had formerly been on the staff of Touro Infirmary, testified for appellant. This man had had tremendously more experience as a specialist in this field, than any of the others who testified in this cause. He testified (T-234), "Any disease of the esophagus will be known usually by one symptom, that is, dysphagia, or difficulty in swallowing."

"The history written by Dr. John says that he had difficulty in swallowing many years before he was supposed to have swallowed a foreign body. The only way to prove that a foreign body had perforated his esophagus is to find the foreign body in the lesion, because there are so many things, especially ulcers of the esophagus. You folks often have ulcers of the stomach, and not infrequently peptic ulcers of the esophagus, and we do know that peptic ulcers will grow out sometimes suddenly. This man has had symptoms many months of difficulty in swallowing. It is in the record. I say he had ulcers. He did have a perforated diverticulum because he had difficulty in swallowing. It is all in the record. *This particular case*

here is the additional diverticulum. Why couldn't he have ulcers? I ask that question because the foreign body was removed from there. How many foreign bodies are removed from the rectum that did not have a perforated esophagus? You have peptic ulcers all through the diverticulum tract—32 feet from the pharynx to the rectum and they are known to become inflamed, known as diverticulitis. The diverticulum is a weakness in the wall of any portion of the internal tract. In this case you may have diverticulum in other tubes in the body, but here in the diverticulum tract you have weakness of the wall unless some involvement around the esophagus before causing a pulling—that is known as traction—pulling the esophagus out and causing weakness of the wall. What happens? The muscles supporting the esophagus—two muscle bands running down with ordinary cool drink, would carry down from the throat to the stomach, and the movement of the muscles of the esophagus ingested the food down to the stomach, but here the muscles were weakened, the cause of which is not known. It isn't found in the young, but in the old folks. You may have just a thick lining of the esophagus, and just show that there would be some occasion, and maybe without any accident of any kind, when this thing may blow out. It is an analogy to weakness in an inner tube of a tire. It thins out and then you know the thing will blow out.

"This perforation here cannot be said to be due to any foreign body, or pathologically to any other disease, because from a study of the above reports, the man who used the microscope didn't show any foreign body. A

diverticulum ulcer perforation may disappear entirely. You have nothing of that there but the base, which is the esophagus."

Q. Would you say that possibly without doubt that crab shell taken from the anus caused this?

A. *I would say you could not appear before a medical gathering and be able to say a foreign body caused the perforation.*

He testifies in Transcript 242 that peptic ulcers in the esophagus are not rare, peptic ulcers that penetrate the diverticulum are found anywhere in the esophagus. There is a difference between an ulcerating diverticulum and a peptic ulcer. He continues, "I would like to demonstrate to the Court what a peptic ulcer is, why it occurs in the lower part of the esophagus, because I don't believe the jury understands what a peptic ulcer is." On page 243 he testifies:

A. Yes. In the light of my knowledge, it is my belief and the experience of others that there was another diverticulum. We know as a fact no foreign body was found in that lesion, which makes it most likely that was caused by an ulcerated diverticulum or peptic ulcer."

On page 244, he testifies: "My explanation is that in the history this man had the appearance of another diverticulum, that he had a rupture of the diverticulum, or ulcer of another nature, but a different lesion from a foreign body, as no foreign body was isolated from the

lesion." And he answers on page 244, "We are talking about the penetration of the esophagus, are we not?"

Q. That is correct.

A. The only way to scientifically make a diagnosis of a perforated esophagus as a result of a foreign body is to find the body in the perforation.

Q. I believe I understand you. Now you are not denying there could have been a perforation by the foreign body?

A. I am denying a foreign body perforated it.

Q. It could have?

A. I have no proof of it.

Q. Doctor, it could have?

A. Yes. We go back to the same thing. The foreign body not found in medical—are you familiar with medical literature?

And on Transcript 245, when pressed with the question, "It could have been result of the injection of a foreign body?"

A. With the history and findings, I doubt it.

And he again reiterates, T-251: "Neither of the surgeons isolated anything to prove what caused the perforation."

We have gone into the facts as shown by this record under belief that the judgment of the lower Court and the verdict are not in keeping with the facts presented in the case. We feel that the extravagant verdict originally rendered showed that the jury was carried away

by sympathy, by prejudice. We believe this was shown by the attitude of the Judge that he would grant, as shown in his order T-297 a new trial and he ordered the granting of a new trial on the ground of excessiveness of the verdict unless within ten days counsel for plaintiff entered a remittitur for $10,000.00. Does not this order for the entry of a remittitur show that the Judge believed that the jury below must have been carried away by a sympathy so great as to amount to prejudice against the appellant?

Nothing in this record shows any damage occasioned by the fault of the appellant. Nothing in this record shows that the plaintiff himself testified to that effect.

C. THE DOCTRINE OF *RES IPSA LOQUITUR* SHOULD HAVE PREVENTED RECOVERY.

The verdict is so terribly excessive, based on a claim for damages which was never itemized in the bill of complaint, based upon a pure claim as set forth in paragraph 8 of the supplemental petition (T-8) of *res ipsa loquitur*. We feel there is no jurisprudence, no law which grants recovery to a plaintiff without a showing of negligence, without a showing even under the doctrine of *res ipsa loquitur*, that the instrumentality actually did come from the hands of the appellant or his agents, servants or employees, always in full and complete possession and control of the object.

The case of *George Dorman and Travelers Insurance Company v. T. Smith and Sons*, 223 La. 29, 64 So. (2d) 833, is recent law in Louisiana on the doctrine of *res ipsa loquitur*.

In that case the Court handed down the doctrine which is the law of Louisiana today: In order for *res ipsa loquitur* rule to apply it must be shown that circumstances attending the accident were such as to create inference of negligence on the part of the defendant. That control and management of the instrumentality which caused the injury was exclusively vested in defendant, and that plaintiff is not in a position to show particular circumstances which caused instrumentality to operate to his injury, whereas the defendant being in such position possesses superior knowledge or means of information as to the cause of the accident." Citing *Morales v. Employers' Liability Assurance Corporation*, 202 La. 755, 12 So. (2d) 804; *A. & J., Inc. v. Southern City Distributing Company*, 173 La. 1051, 139 So. 477.

Had the crab shell been a small piece of shell, we could understand how the plaintiff might be able to complain that he was not negligent. But he did not get the crab shell at Arnaud's, and if he had gotten it at any other place he certainly should have been able to know that he was swallowing a piece of crab shell as big as a half dollar.

WHEREFORE, for the reasons set forth hereinabove, petitioners pray that this Court do issue a writ of certiorari herein to the United States Court of Appeals for the Fifth Circuit and that in due course, the judgment of the United States Court of Appeals for the Fifth Circuit shall be reversed, or in the alternative, that this cause should be sent back to the United States District Court for the Eastern District of Louisiana with instructions for its hearing in a new trial.

And petitioners pray further for general and equitable relief.

Respectfully submitted,

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New Orleans, La.,
Attorney for Applicants;

RICHARD B. MONTGOMERY, JR.,
CICERO C. SESSIONS,
806 National Bank of Commerce Bldg.,
New Orleans, La.,
Attorneys at Law,
Of Counsel.

We hereby certify that this application is filed in good faith and not for purpose of delay.

SIDNEY G. ROOS,
RICHARD B. MONTGOMERY, JR.,
CICERO C. SESSIONS.

CERTIFICATE OF SERVICE.

We hereby certify that a copy of this brief has been served on Jones, Walker & Waechter (A. J. Waechter and Michael Molony, Jr.), by sending a copy hereof to them thru the ordinary mail addressed to them at 847 National Bank of Commerce Building, New Orleans, La., this _____ day of _____, 1954.

SIDNEY G. ROOS.

OPINION OF THE COURT—Filed May 20, 1954

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14658

ARNAUD'S RESTAURANT, INC., ET AL., Appellants,

versus

THOMAS P. COTTER, SR., Appellee

Appeals from the United States District Court for the Eastern District of Louisiana

May 20, 1954

Before BORAH and RUSSELL, Circuit Judges, and DAWKINS, District Judge

RUSSELL, Circuit Judge: The amended complaint alleged in substance that the plaintiff went to Arnaud's Restaurant in New Orleans, Louisiana, and was there served an order of pompano en papilotte which, by reason of the negligence of the latter, contained a large, solid piece of crab shell which was a substance foreign to that dish; also that Arnaud's represented to the public that the food served was fit and proper for human consumption; that the plaintiff swallowed the piece of crab shell with results, detailed in the complaint, which caused him damages and injuries and expense. The answer of the defendants, Arnaud's Restaurant, Inc., and its insurer, London Guarantee and Accident Company, Ltd., raised the general issue and in the alternative alleged that the plaintiff was guilty of contributory negligence. The evidence adduced at the trial, insofar as it is pertinent here, is related below.

On January 5, 1951, plaintiff, his wife and two friends, arrived in New Orleans, Louisiana, to spend the weekend. That evening at about 8 o'clock they went to Arnaud's Restaurant for their evening meal. Each of them ordered and was served a fish dish known as pompano en papilotte which they consumed on the premises. Shortly after leaving the restaurant plaintiff complained of a "bad case of indigestion". He and Mrs. Cotter returned to their hotel room at about ten o'clock and plaintiff, seeking relief from what he described as a "marvelous case of indigestion", took some magnesia tablets. The next morning, after a restless sleep, he was suffering from pains in his chest, gagging and belching. During the day he took tums and pepsin to relieve his pain. Later he gave himself an enema and took a dose of sal hepatica, but was still not relieved of his discomfort. That evening a doctor was called and on his orders plaintiff was removed to the hospital.

Plaintiff's ailment was at first diagnosed as coronary thrombosis and he was administered treatment accordingly. However, further examination disclosed that he was suffering from a perforation of the esophagus. After he had been hospitalized for several days, plaintiff complained of severe rectal pains. Upon examination by the attending physician it was discovered that a very hard object was lying horizontally across his upper rectum. The object, a piece of sharp crab shell approximately two to three centimeters in size, was dislodged and removed from the rectum. The medical and surgical treatment which followed [1]

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[1] A fair statement of this treatment and its results is contained in the plaintiff's brief as follows:

"Because the administration of antibioties and conservative care was unsuccessful as a method of treatment, Dr. Howard Mahorner performed a mediastintomy, which is an operation to explore the mediastinum, inserting drains from the exterior of the body into the chest cavity, also inserting a feeding tube into the stomach for feeding purposes.

extended over a period of several months at an expense of approximately $13,800.

There was testimony to the effect that the injury to plaintiff's esophagus could have been, and very likely was, caused by the ingestion of the crab shell. It was the opinion of his medical experts that the perforation was caused by a trauma and could not have been caused by disease. Symptoms occasioned by a traumatic perforation of the esophagus occur immediately. Since the plaintiff had not eaten anything between the time he ate a vegetable plate for lunch and his visit to Arnaud's, it was the theory of his case that he must have ingested the crab shell during his evening meal, otherwise the symptoms of which he complained would necessarily have occurred earlier.

The defendants, in support of their defense that it was impossible for there to have been any crab shell in the pompano en papilotte, as contended by plaintiff, offered

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Appellee apparently had a rather uneventful recovery and in a couple of weeks returned to his home in Jackson, Mississippi. While appellee was convalescing at his home in Jackson, Mississippi, he had a recurrence of the symptoms for which he had been operated on in New Orleans. Appellee's family physician, Dr. Harvey Johnston, after telephonic consultation with the New Orleans physicians, performed a second mediastinotomy on February 17th. After the operation, appellee was in such critical condition as a result of a lung collapse, that he was required to undergo another operation involving the installation of tubes into his chest. Thereafter, and until July of 1951, the opening made into the mediastinum from the exterior of the plaintiff's back was kept open for drainage purposes by forceful insertion of the physician's fingers as deep as the fingers would reach three times each week. Because appellee did not respond, after consultation with Boston specialists, a fourth operation was performed and the lower one-fourth of the esophagus was removed. Appellee's spleen was removed and the stomach moved into the chest cavity in order to be connected with the lower end of the remaining esophagus. By October 15, 1951, appellee had sufficiently recovered so that he was able to resume some of his usual activities. By the time of the trial he was able to carry on most normal activities that did not involve physical exertion. However, for the rest of his life Mr. Cotter will be required to live on a restricted diet and will suffer from indigestion, gas pains and regurgitation of his food to such an extent that his sleep at night is continually interrupted."

evidence to show how the food was prepared and the precautions which were generally taken to prevent such an accident. According to this evidence no crab meat is used in preparing pompano as it is served at Arnaud's and all reasonable precautions are taken to prevent foreign matter from finding its way into the prepared dish.

The case was submitted to the jury on special issues. It rendered a verdict finding that the crab shell came from the pompano en papilotte, that it was the cause of the injury suffered by plaintiff, that plaintiff was not negligent in failing to detect the presence of the crab shell before he swallowed it and that his damages were $55,500. The trial court overruled the defendants' motion for a judgment *non obstante veredicto,* ordered that a remittitur in the amount of $10,000 be filed and, after the filing of the remittitur, entered judgment for the plaintiff in the amount of $45,500.

For the purpose of this appeal the defendants apparently concede that the evidence is sufficient to sustain the findings of the jury that plaintiff ingested the crab shell at Arnaud's and that it caused his injury. In our view there was ample evidence before the jury to justify these findings. It is contended, however, that the court erred in trying the case on the theory of implied warranty and in holding that plaintiff was not required to prove that Arnaud's was guilty of negligence, either actually or by the application of the doctrine of *res ipsa loquitur.* It is further contended that the verdict was so excessive as to show that the jury was prejudiced. The defendants allude to the plaintiff's failure to discover the crab shell before he swallowed it and urge that this constituted contributory negligence as a matter of law.

The primary question for determination is whether under the decisional law of Louisiana the proprietor of a public eating place who serves a food fabricated by him

and containing a foreign substance to a paying guest for immediate consumption on the premises is under an absolute liability for damages proximately resulting from the impurity, under the theory of an implied warranty of fitness. Our review of the authorites [2] convinces us that such is the law of Louisiana. Consequently, the trial court correctly enforced and applied this principle in the trial of the present case.

This rule of liability was first announced in *Doyle* v. *Fuerst & Kraemer, Ltd.*, 56 So. 906, where the Supreme Court of Louisiana held that the seller of food at a public eating place is conclusively presumed to know any unwholesome condition of the food and is answerable in damages to a purchaser who is made ill because of the unwholesomeness. The basis of this holding was said to be that:

> ". . . every one ought to know the qualities, good or bad, of the things which he fabricates in the exercise of the art, craft or business of which he makes public profession, and that the lack of such knowledge is imputed to him as a fault, which makes him liable to the purchasers of his fabrications for the damages resulting from the vices or defects thereof which he did not make known to them and which they were ignorant of."

The defendants' reliance upon the concurring opinion of Justice LeBlanc and the dissenting opinion of Justice Hawthorne in *LeBlanc* v. *Louisiana Coca Cola Bottling Company, supra,* is misplaced. It is the majority opinion

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[2] Doyle v. Fuerst & Kraemer, 56 So. 906; MacLehan v. Loft Candy Stores, Inc., 172 So. 367; Kelly v. Ouachita Dairy Dealers Cooperative Ass'n, 175 So. 499; Ogden v. Rosedale Inn, 189 So. 162; LeBlanc v. Louisiana Coca-Cola Bottling Co., 60 So. 2d. 873. See also Arndt v. D. H. Holmes, 119 So. 91.

in that case to which we look for guidance. While the Court was there dealing with a manufacturer's liability for injuries caused by the consumption of deleterious ingredients contained in a bottled beverage, it carefully pointed out that under Louisiana jurisprudence a plaintiff in such a case is entitled to rely upon the manufacturer's implied warranty that its product is safe for human consumption.[3]

The principle, contended for by the defendants, that a customer who eats meat dishes ought to anticipate the presence of bones which are natural to the type meat served and cannot hold the restaurant keeper liable for an injury occurring as a result of the presence of such bones, is supported by a number of authorities,[4] but it is not applicable to the facts of this case. Those cases are based upon that proposition that a bone natural to the meat which is served is not a foreign substance to that particular dish. Since the defendants admit, and the evidence shows, that Arnaud's does not use crab meat in the preparation of pompano en papilotte, we agree with the plaintiff that the piece of crab shell contained in the dish served to him was a foreign substance. It will not do to categorize all sea foods usually served in restaurants as a common dish.

No affirmative evidence was offered by the defendants to sustain their defense of contributory negligence, and

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[3] It was noted in that case that there is a divergence of opinion among the State courts as to whether in such cases a manufacturer's liability is predicated upon negligence or an implied warranty. There is likewise an irreconcilable conflict of authority as to whether there is an implied warranty of fitness and quality where food is prepared and served to a customer to be consumed on the premises, see 22 Am. Jur. 878, Food, Secs. 94, et seq. However, the cases cited in footnote 2, supra, leave no doubt that under Louisiana jurisprudence the keeper of an eating place does make such a warranty.

[4] See Mix v. Ingersolt Candy Co., 59 Pac. 2d. 144; Goodwin v. Country Club of Peoria, 54 N. E. 2d. 612; Silva v. Woolworth, 83 Pac. 2d. 76.

thus the only evidence contained in the record upon which the jury could have found that plaintiff was negligent was the fact that he failed to detect the presence of the crab shell before he swallowed it. We are unwilling to hold that his failure to discover the crab shell contained in the pompano en papilotte, served as it was and containing a number of ingredients, established contributory negligence as a matter of law. The circumstances presented an issue of fact for determination by the jury under proper instructions by the court, as were given in this case.

The verdict returned by the jury cannot be said to be legally excessive. The granting or denial of a new trial because of the amount of damages awarded by the verdict of the jury rests within the sound discretion of the trial court. The trial court exercised its discretion and ordered a remittitur in the amount of $10,000 and upon the entering of the remittitur affirmed the modified verdict and entered judgment accordingly. Under the facts disclosed by the record we are unable to say that the court abused its discretion. Excessiveness or inadequacy in fact of a jury verdict presents nothing for our review,[5] and we find nothing in the record to sustain the contention that the verdict was so excessive as to show that it was the result of prejudice or otherwise improperly motivated.

No reversible error appearing, the judgment is affirmed.

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[5] Capella v. Zurich General Accident Liability Ins. Co., 5 Cir., 194 F. 2d. 558.

JUDGMENT

Extract from the Minutes of May 20, 1954

No. 14658

ARNAUD'S RESTAURANT, INC., ET. AL.,

versus

THOMAS P. COTTER, SR.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, Arnaud's Restaurant, Inc., and another, and the sureties on the supersedeas bonds herein, United States Fidelity and Guaranty Co., and Phoenix Indemnity Company, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

ORDER DENYING REHEARINGS

Extract from the Minutes of August 16, 1954

No. 14658

ARNAUD'S RESTAURANT, INC., ET. AL.,

versus

THOMAS P. COTTER, SR.

It is ordered by the Court that the petitions for rehearing filed in this cause be, and they are hereby, denied.

45/2

No. 444

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14,658

ARNAUD'S RESTAURANT, INC., ET AL.,
Appellants,

versus

THOMAS P. COTTER, SR.,
Appellee.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

ROOS AND ROOS,
SIDNEY G. ROOS,
Attorneys for Appellants and Applicant,
Arnaud's Restaurant, Inc.

Montgomery & Co., Inc., Publishers, 630 Chartres St., N. O., La.

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UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14,658

ARNAUD'S RESTAURANT, INC., ET AL.,

Appellants,

versus

THOMAS P. COTTER, SR.,

Appellee.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

Now comes Arnaud's Restaurant, Inc., appellant in the above entitled and numbered cause, and on suggesting to this Honorable Court that appellant is aggrieved by the judgment rendered in this cause on the 20th day of May, 1954; that the said judgment, so appellant believes and avers, is not in keeping with the law, and that a rehearing should be granted to appellant in this cause, for the following reasons:

1) The Court below erred in not directing a verdict for appellant, and this Court erred in not holding that

the lower Court should have directed a verdict for appellant.

2) The Court below erred in not sustaining the motion for a judgment notwithstanding the verdict. And this Court erred in not decreeing that the lower Court should have sustained a judgment for defendant notwithstanding the verdict.

This judgment is based purely on hearsay and supposition and on no real, direct evidence.

3) The Court erred in not holding that the lower Court was erroneous in charging the jury that there was a warranty on the part of the restaurant owner as to the wholesomeness of food and against there being any foreign substance present, (because none of the evidence showed that the crab shell in question was obtained at the restaurant of the defendant, and the plaintiff himself admitted that he had no knowledge of having obtained the crab shell as big as a half dollar there).

4) The Court erred in not holding that the doctrine of *res ipsa loquitur* does apply because the doctrine of *res ipsa loquitur* is based upon facts in which possession and control of the instrumentality (generally a dangerous one) never leave the hands of the defendant.

5) This Court erred in not holding that the jury was improperly charged, and was not properly charged that the burden was upon the appellee to show that the

piece of crab shell as big as a half dollar was in the pompano en papillote. The Court erred in not granting a new trial, because obviously the verdict of the jury and the judgment of the lower Court was based upon speculative loss of earnings, which were never proved in the record and could not have been proved in the record because of the speculative nature thereof.

6) The Court erred in not entirely setting aside the verdict and judgment of the lower Court because that judgment was so excessive that prejudice of the jury was shown.

7) This Court erred in not entirely setting aside the old verdict on the ground of prejudice where even the lower Court must have seen that the excessiveness of the verdict was so great as to amount to prejudice on the part of the jury—so we must believe, because of the lower Courts insisting that unless a remittitur of $10,000.00 were granted in the cause that he would grant a new trial.

8) The Court erred in not reversing the judgment and verdict of the lower Court for the reasons that in Louisiana negligence must be alleged and proved and the lack of it need not be shown by a defendant as a plaintiff always carries a burden of showing negligence on the part of the person whom he claims has caused him damage (for the reason that recovery in Louisiana is had in this case under *Article 2315 of the Civil Code* on which the whole action of the plaintiff was based).

WHEREFORE, petitioner prays that it may please this Honorable Court to grant petitioner an opportunity to argue upon this petition, that in due course a rehearing be granted herein and that the verdict and judgment rendered herein on May 20, 1954 be reversed.

And for all general and equitable relief.

ROOS AND ROOS,
Attorneys for Petitioner,
By_____
SIDNEY G. ROOS.

We hereby certify that the above and foregoing petion for a rehearing is filed in good faith and not for purpose of delay.

ROOS AND ROOS,
Attorneys for Petitioner,

By_____
SIDNEY G. ROOS.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 14,658

ARNAUD'S RESTAURANT, INC., ET AL.,

Appellants,

versus

THOMAS P. COTTER, SR.,

Appellee.

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

THE ARGUMENT.

May It Please the Court:

Application for rehearing is requested in this cause for the reason that the writer believes that the judgment of this Court was in error as set forth in the application, and in support of our contentions we humbly urge the following:

It was so clearly shown that the verdict was highly excessive that the Judge of the lower Court went on record to declare that unless a remittitur of $10,000.00 was

granted in the cause, that a new trial would be granted. This showed that the judgment was excessive and the amount of the excess was so great as clearly to reflect the attitude of the jury which could only have rendered an exhorbitant verdict such as this if prejudice existed in their mind. This is particularly true when the facts themselves show that the plaintiff not alone in accordance with his own statements, but in accordance with the statements of his doctors, in accordance with the history of the case, declared that he had no recollection of ever having swallowed a piece of crab shell at appellant's restaurant.

The Transcript at pages 54 and 55 show that he denied to his Dr. Kaplan having ingested anything foreign. The same is true on Transcript 79. On page 55 when Dr. Pazant asked him what the story was, he told him that he denied swallowing anything. This is also shown in the Transcript at page 68.

The history of this man's case shows that he had had a long history of painful swallowing. It shows that the patient felt bad that Friday **morning.**

In the brief submitted before your Honors by the former attorneys in this cause, we feel that the Court's attention was possibly not forcibly enough drawn to the character of the evidence on which this verdict was based.

On page 54 of the transcript the Court put the following question to Dr. Murrell H. Kaplan:

Q. Did you make a diagnosis of what he was suffering from at that time?

A. I thought the possibilities were he had a heart condition, coronary thrombosis, **inasmuch as he denied ingesting anything foreign.**

and on page 55, in continuation of his answers to the Judge of the lower Court, he says:

> "At that time Dr. Payzant asked me what was the story **and I told him that the man denied swallowing anything,** but I was looking for a possible perforation of the esophagus and he told me that he could demonstrate it, that he would like to recheck him the following morning."

Then on page 68, Dr. Kaplan was asked, under cross examination,

Q. Let us assume the hypothesis, there is a laceration, the esophagus was not penetrated, I believe you have conceded it is possible for the laceration to become infected?

A. Yes.

Q. And then if the infection completes the penetration of the wall of the esophagus so that there will be a penetration can you limit the time of that process to two or three hours, or in your opinion, **could it last for as long as ten hours, or even longer?**

A. **That is right.**

On page 69 he testified that he was not present when the crab shell was removed from Mr. Cotter's rectum, that he did not know where the crab shell is at present.

It is singular to note that **the crab shell was never introduced in evidence.**

On Transcript 70 it was shown that on page 13 of the history record introduced in evidence dated January 20, "Additional history at this date reveals a long history of dysphagia, which has cleared somewhat during the past month."

The doctor on that page says that **he did not take that entry in the hospital record into account in making his diagnosis!** Dysphagia, the record discloses, is defined as painful or difficult swallowing, (T-70). Dr. Kaplan testified (T-66) that he did not ask the man where he had lunch or what he had to eat for lunch on January 5, the date on which he claimed he was injured by the crab shell.

He, on page 71, said, "I did. This is the reason I thought he had thrombosis, **particularly when he denied swallowing any foreign object.**"

On Transcript 72, in spite of the fact that the doctors of the plaintiff base their entire opinion of this case merely on their belief, without one single iota of evidence for either the doctors or the jury, on which to formulate their opinion, the vacillation of the doctor is shown:

Q. Isn't it also your opinion that it is possible Mr. Cotter's difficulty in his esophagus **could have had its origin, and had been caused from, natural weakness?**

A. **If he had a history of dysphagia, of long standing, . . .**

On Transcript 73 he goes on to say: "Certainly anyone who gave a history of heartburn, indigestion and dyspepsia for a period of time, could have peptic ulcers of the stomach."

On page 78 the same doctor, on whose testimony we believe this whole verdict is based, testifies in re-cross examination:

Q. You have no way of telling when Mr. Cotter may have swallowed the piece of crab shell that was taken out of his rectum?

A. No.

Q. You just don't know?

A. No.

Q. It could have been at a noon meal or a night meal?

A. He could swallow it any time, as far as the history, that is where we make most of our diagnoses.

Q. But the history you took into account did not include anything about where Mr. Cotter ate lunch, what he had for lunch.

And then he continues on in reading his progress reports,

A. Yes, "Substantial pain seems to be present or precipitated by swallowing and deep breathing, **and denies swallowing any shells from crabs, shrimps, etc., although he did eat shrimp and fish Friday night."**

(T-79) On that same page, in answer to the query,

Q. What time do you think Mr. Cotter's esophagus was penetrated?

A. **You see it is my opinion that he had a localized perforation for about three or four days.** He had a high blood count, but it seemed. . . ."

It is to be remembered that Drs. Kaplan and Goldman did not produce their office records, and that **they testified almost entirely from memory of events that happened over two years and five months before.** Dr. Allan Goldman only saw him the morning following his admission to the Touro which was on January 7 (T-83) and he testified on transcript 84 that he was present when Dr. Kaplan took the man's history, and this is Dr. Goldman's statement:

A. **Dr. Kaplan questioned him repeatedly as to whether he had swallowed anything and he denied it.**

I find a little difficulty in understanding who actually removed the crab shell from the man's rectum. On Transcript 85 Dr. Allan Goldman testifies that he did so. Dr. J. Harvey Johnson, Jr., testified on T-131; see also Tr. 109, 249.

A. Mr. Cotter told me—all I'm going to do is to tell you exactly what he told me—that following the meal at Arnaud's he had lower chest pain and indigestion when he arrived back at his hotel. That during the night he took numerous home remedies, that it was worse next day so he consulted Dr. Kaplan. At first

> they thought he was having heart disease but a barium esophogram showed a leakage of barium from the esophagus into the mediostinum. **The same day he had an intense rectal pain and a piece of crab shell which had become incarcerated, was removed from his rectum by an orderly."**

This leaves wide open in our minds who actually removed the crab shell. It must be remembered that the crab shell was not introduced in evidence and we've never seen it.

On Transcript 85 Dr. Goldman testifies that the piece of crab shell was approximately 2 to 3 centimeters. Under the table of metric equivalents 1 centimeter is equal to 0.3937 of an inch.

This means that the piece of crab shell was about 0.7874 of an inch by 1.1921 inches!

A half dollar is about the size of the longer dimension! Is it possible that the plaintiff could have swallowed an objectionable piece of food the character of a piece of the hard back of the crab, **the size of a half dollar** and have no recollection of having ingested crab shell, as he repeatedly said he had no recollection of eating it?

To further cloud the issue, Dr. Goldman testifies that it was approximately rectangular in shape. Dr. Howard Mahorner (who was not present) testifies on T-109, "Among other evidences, was the fact that **one of the**

orderlies had obtained a piece of crab shell from his rectum. The nurse showed me this crab shell. We assumed that was what caused the trouble.

Q. Doctor, could you describe the crab shell you saw?

A. I don't have in my records any accurate measurements on it, but I assume it was from an inch to an inch and a half in length and from half an inch to an inch in width. It was triangular and it looked like a piece of shell rather than a piece of claw, or if it was a claw it was the side of the big claw.

The writers of this brief know that your Honors are very reluctant to disturb the findings of a jury on matters of fact, and that it is only when it is clearly wrong that your Honors will do so. We believe your intervention is necessary to accord justice.

Dr. Silverman, in his testimony, shows that he vigorously discounts the decisions of these two doctors, on T-249, and in his own words we have the following:

Q. And you vigorously discount their decisions of what caused this man's condition?

A. I have to, because in one letter it states that an orderly removed the foreign body from the rectum, and the other doctor,—I'm not criticizing them, it might have been a typographical error—said the doctor removed it."

Q. You don't know who removed the foreign body?

A. It is not clear.

Q. But you did examine all the records?
A. Oh, yes, yes. Let me read the letters of Dr. Kaplan and Dr. Mahorner, I will read the letter of Dr. Kaplan and then Dr. Mahorner.

It must further be remembered that the Doctors Kaplan and Goldman formulated their opinion as to when the man first suffered, based upon **pure hearsay,** on **what he told them** about when his first pain was experienced after supper and did not take into consideration the history of dysphagia.

Their opinion is certainly based merely on pure hearsay as to when he first experienced pain.

On Transcript 60, Attorney for appellant exhibited to Dr. Kaplan the case history of Mr. Cotter and read the following: "Patient states he was well until Friday morning, (the day of the visit to Arnaud's). That morning he awakened and felt a bit generally bad."

And on Transcript 61, that the record shows that the patient had been having shortness of breath for the past month, especially with bending forward, and that he, Dr. Kaplan, did not recall Cotter's having made those statements to him when he first took his case history.

He further testifies, and it must be remembered that this verdict of the jury is based chiefly on his testimony, on T-61, 62:

Q. Were you making notes while talking to him?
A. Just mental notes. I don't remember taking any notes.

Q. Did you ever make any notes?
A. Yes. In the hospital. Progress notes.

Q. Do you have any office records embracing any notes you made?
A. No.

And we come back to the testimony of the plaintiff himself.

Q. **Mr. Cotter do you remember having swallowed that crab shell?**
A. **No sir.**

Q. **Were you conscious of it?**
A. **No Sir.**

Q. **Do you know where you got it?**
A. **I have no idea.** (Tr. p. 168).

Then Dr. Allan Goldman (T-89, 90, 91) who testifies that he was present when the history was given to Dr. Kaplan by the patient, testifies that he didn't remember anything about the man's statements of his activities prior to his having gone to Arnauds for dinner. When plaintiff went to Arnaud's it was on January 5th, 1951 (his suit claims Jan. 3) 1951, (see Tr. 157 and Tr. 3, 7). When the case was tried it was June 8, 1953, **two years and five months after the man claimed he went into Arnaud's restaurant.** All the testimony of these doctors is made without any notes, made in their own offices, and made entirely on their own recollections of two years and five months before! It is amazing and hard to believe that their memories can be so accurate after a lapse of so much time.

The very admit note shows again on T-92 the patient has been feeling . . . "somewhat SOB (shortness of breath) for the past month, especially with bending forward." Thursday felt fine. Friday felt out of sorts on awakening and much exertion that day. **Soup for lunch."**

Now with permission of the Court, we will turn from page 92 where the plaintiff said he had soup for lunch, to his testimony on T-159 where he says he went to a restaurant known as the **Barbaric,** close to the Bueno Vista, and that he ate a vegetable plate, being Friday again, it was lettuce, tomatoes and asparagus. That he ate lunch with other people—Jim Taylor, a Mr. Rush, personnel engineer, a Mr. Edwards and a Mr. Tom Enshaw. Tom Enshaw testifies on Transcript 253 that he never heard of a restaurant by the name **Barbaric,** and that the restaurant to which they went on that occasion was the **Bungalow** Restaurant. He testifies that at that meal (T-254):

A. I recollect someone did eat fish—some had crabmeat cocktail, some had shrimp cocktail. I had crabmeat cocktail. We ate there for some time until we more or less got tired of the place.

Q. Do you remember what Mr. Cotter had for lunch?

A. I can't remember exactly what he had. **I am sure he had a fish dinner.**

He further testifies that the Bungalow at which the complaining plaintiff had eaten at noon time on the day he complained he swallowed a crab shell, and when

asked about the kind of restaurant he answers: "It is primarily a steak house right on the Gulf side, the Bay side, there, and they cater to people who want fish, fried oysters and crabs."

Against the various conjecture of these two doctors you have the testimony of another doctor, one called in also by the plaintiff himself, Dr. Howard Mahorner. He was asked the following questions (T-113) and gave the following answers:

Q. Can you say whether or not he had just a laceration which ultimately ruptured or ulcerated and then perforated, or that he had a perforation immediately.

A. No, I can't say that.

Q. He might have had just a laceration which subsequently, a number of days after, by process of infection may have completed the perforation.

A. That is possible.

Q. You just assume, don't you, that the crab shell caused Mr. Cotter's difficulty? **You don't know that by any scientific method available to you, do you, as a positive fact?**

A. **No, I can't state it as a positive fact.**

And on T-115, he says: "The truth of the matter is that so few of these cases that no one man has had much experience with them during his lifetime. I don't think the doctors could say. Maybe they know, but I doubt, I can't answer you yes or no.

Mrs. Conner, a member of that party of that night testifies Transcript 120 that she did not hear Mr. Cotter complain about feeling bad after coming out of Arnauds.

We respectfully call the Court's attention to the testimony on T-153 given by Dr. J. Harvey Johnston, Jr., which was to the effect that in the operation made in his hospital the man's right chest had been inadvertantly, accidently, entered during the operative procedure causing the collapse of the right lung. That the man's convalescence following this operation was very stormy.

We believe that a great deal of the plaintiffs difficulty in recovery was due to the fact that a collapse of his lung had been caused. This would certainly not be a direct incident to his original swallowing of a piece of crab shell if a physician selected by him, through his lack of care and knowledge, caused his convalescence to be delayed. That doctors testimony, T-142, is: "I think he is able to carry on an ordinary life without strenuous exertion except for relatively mild symptoms of indigestion and gas". Dr. Mahorner testified ". . . when plaintiff left here we considered him well" (T-111).

We therefore submit that the injury to this patient, based upon his own physician's testimony, is that he had no permanent total disability, on which to base a judgment of such great magnitude. He too, testifies, Transcript 146, that **at no time did plaintiff ever tell him he had eaten crabs, nor did he ever tell him that he felt crab shell in his mouth.** He further testifies on T-147, when asked whether he could have eaten the crab shell at noon:

A. That is possible. The foreign body could have been lodged in the lower esophagus and not necessarily the eating of the food dislodged, but the sharpness of the object could have allowed it to erode through the wall of the esophagus because it is a wall about 1/3 of an inch in diameter. He further testifies that a ruptured ulcer of the esophagus could occur. That they found no foreign object, and he repeats with certainty again on Transcript 49,

"I was never told by the patient he ate crabs."

This doctor testified, Transcript 152, that he had seen children who had swallowed coins and **"you don't find out about them until they errode through** and we don't get much history from the mothers or any complaints until it has erroded through."

We come to the cross examination of the plaintiff and on T-194, 195 we find:

Q. Now you had no idea at that time, as I take it, from the way you felt that you had swallowed anything?

A. No sir.

Q. **Did you chew the pompano as you ate it?**

A. **Yes sir.**

Q. **Never at any time while you were chewing the fish you felt anything that felt like a piece of crab shell?**

A. **I can't say that I did, sir.**

Think of it! A piece of crab shell almost as big as half a dollar!

Dr. Edward Allen John took the history, Transcript 217, 218: "Additional history at this date reveals a long history of dysphagia which has cleared somewhat during past month." Then on page 218, "dysphagia is a term which has to do with difficulty in swallowing, possibly pain, possibly distress, possibly inability to swallow food."

Then on pages 2, 3, 9 and 13 of the history of the patient taken by Dr. John are very significant.

Dr. Dan Silverman, a specialist in gastro-enterology, who had been actively in practice in this community since 1917, who was a member of, and is a member of the staff of Southern Baptist Hospital, Hotel Dieu, who belongs to the American Gastrological Association, and American College of Physicians, Southern Medical Association, Louisiana State Medical Society, Orleans Parish Medical Society, who had formerly been on the staff of Touro Infirmary, testified for appellant. This man had had tremendously more experience as a specialist in this field, than any of the others who testified in this cause. He testified (T-234), "Any disease of the esophagus will be known usually by one symptom, that is, dysphagia, or difficulty in swallowing."

"The history written by Dr. John says that he had difficulty in swallowing many years before he was supposed to have swallowed a foreign body. The only way to prove that a foreign body had perforated his esophagus is to find the foreign body in the lesion, because there are

so many things, especially ulcers of the esophagus. You folks often have ulcers of the stomach, and not infrequently peptic ulcers of the esophagus, and we do know that peptic ulcers will grow out sometimes suddenly. This man has had symptoms many months of difficulty in swallowing. It is in the record. I say he had ulcers. He did have a perforated diverticulum because he had difficulty in swallowing. It is all in the record. **This particular case here is the additional diverticulum.** Why couldn't he have ulcers? I ask that question because the foreign body was removed from there. How many foreign bodies are removed from the rectum that did not have a perforated esophagus? You have peptic ulcers all through the diverticulum tract—32 feet from the pharynx to the rectum and they are known to become inflamed, known as diverticulitis. The diverticulum is a weakness in the wall of any portion of the internal tract. In this case you may have diverticulum in other tubes in the body, but here in the diverticulum tract you have weakness of the wall unless some involvment around the esophagus before causing a pulling—that is known as traction—pulling the esophagus out and causing weakness of the wall. What happens? The muscles supporting the esophagus—two muscle bands running down with ordinary cool drink, would carry down from the throat to the stomach, and the movement of the muscles of the esophagus ingested the food down to the stomach, but here the muscles were weakened, the cause of which is not known. It isn't found in the young, but in the old folks. You may have just a thick lining of the esophagus, and just show that there would be some occasion, and maybe without any accident of any kind, when this thing may blow out. It is an analogy to weakness in

an inner tube of a tire. It thins out and then you know the thing will blow out.

"This perforation here cannot be said to be due to any foreign body, or pathologically to any other disease, because from a study of the above reports, the man who used the microscope didn't show any foreign body. A diverticulum ulcer perforation may disappear entirely. You have nothing of that there but the base, which is the esophagus.

Q. Would you say that possibly without doubt that crab shell taken from the anus caused this?

A. **I would say you could not appear before a medical gathering and be able to say a foreign body caused the perforation.**

He testifies in Transcript 242 that peptic ulcers in the esophagus are not rare, peptic uclers that penetrate the diverticulum are found anywhere in the esophagus. There is a difference between an ulcerating diverticulum and a peptic ulcer. He continues, "I would like to demonstrate to the Court what a peptic ulcer is, why it occurs in the lower part of the esophagus, because I don't believe the jury understands what a peptic ulcer is." On page 243 he testifies:

A. Yes. In the light of my knowledge, it is my belief and the experience of others that there was another diverticulum. We know as a fact no foreign body was found in that lesion, which makes it most likely that was caused by an ulcerated diverticulum or peptic ulcer."

On page 244, he testifies: "My explanation is that in the history this man had the appearance of another diverticulum, that he had a rupture of the diverticulum, or ulcer of another nature, but a different lesion from a foreign body, as no foreign body was isolated from the lesion." And he answers on page 244, "We are talking about the penetration of the esophagus, are we not?"

Q. That is correct.

A. The only way to scientifically make a diagnosis of a perforated esophagus as a result of a foreign body is to find the body in the perforation.

Q. I believe I understand you. Now you are not denying there could have been a perforation by the foreign body?

A. I am denying a foreign body perforated it.

Q. It could have?

A. I have no proof of it.

Q. Doctor, it could have?

A. Yes. We go back to the same thing. The foreign body not found in medical—are you familiar with medical literature?

And on Transcript 245, when pressed with the question "It could have been result of the injection of a foreign body"?

A. With the history and findings, I doubt it.

And he again reiterates, T-251: "Neither of the surgeons isolated anything to prove what caused the perforation."

We have gone into the facts as shown by this record under belief that the judgment of the lower Court and the verdict are not in keeping with the facts presented in the case. We feel that the extravagant verdict originally rendered showed that the jury was carried away by sympathy, by prejudice. We believe this was shown by the attitude of the Judge that he would grant, as shown in his order T-297 a new trial and he ordered the granting of a new trial on the ground of excessiveness of the verdict unless within ten days counsel for plaintiff entered a remittitur for $10,000.00. Does not this order for the entry of a remittitur show that the Judge believed that the jury below must have been carried away by a sympathy so great as to amount to prejudice against the appellant?

Nothing in this record shows any damage occasioned by the fault of the appellant. Nothing in this record shows that the plaintiff himself testified to that effect.

The verdict is so terribly excessive, based on a claim for damages which was never itemized in the bill of complaint, based upon a pure claim as set forth in paragraph 8 of the supplemental petition (T-8) of res ipsa loquitur. We feel there is no jurisprudence, no law which grants recovery to a plaintiff without a showing of negligence, without a showing even under the doctrine of res ipsa loquitur, that the instrumentality actually did come from the hands of the appellant or his agents, servants or employees, always in full and complete possession and control of the object.

The evidence shows that the kitchen of Arnauds Restaurant, Inc., was as clean, orderly, as a kitchen could

be. It showed the care used in the preparation of food almost perfection of detail in the management and care of such a restaurant and its food. It shows the impossibility of the plaintiff's having swallowed anything, particularly anything as big as one inch in size. He admits he had no knowledge of it—he admits he did not feel it. He has not even shown the probability that the instrumentality, damage from which he claims he suffered, ever came from that place. In addition to that, on that same day he had been at a seafood restaurant—the Bungalow in Biloxi.

Every opinion of his doctors was a guess, hazarded purely and simply upon his statement to the doctor.

It must be remembered that his statement never showed that he ever swallowed the crab shell in Arnaud's —that he ever had any knowledge that it came from Arnaud's that he ever felt it when he was chewing the pompano en papillote, which is a soft dish, and the crab shell was hard. He made no demand on plaintiff for many months.

We know that this Court is most reluctant to disturb the verdict of a jury on findings of fact, and that it will do so where prejudice, sympathy so great as to amount to prejudice of a jury, is apparent on the face of the record. This record discloses these things.

THE JURISPRUDENCE IN LOUISIANA

Jurisprudence last laid down in Louisiana on the question of res ipsa loquitur is found in a case in which the writer appeared as attorney for the plaintiff. This

is the case of *George Dorman and Travelers Insurance Company v. T. Smith and Sons, 223 La. 29, 64 So. (2d) 833.*

In that case the Court handed down the doctrine which is the law of Louisiana today: In order for res ipsa loquitur rule to apply it must be shown that circumstances attending the accident were such as to create inference of negligence on the part of the defendant. That control and mangement of the instrumentality which caused the injury was exclusively vested in defendant, and that plaintiff is not in a position to show particular circumstances which caused instrumentality to operate to his injury, whereas the defendant being in such position possesses superior knowledge or means of information as to the cause of the accident." Citing *Morales v. Employers' Liability Assurance Corporation, 202 La. 755, 12 So. (2d) 804; A & J, Inc., v. Southern City Distributing Company, 173 La. 1051, 139 So. 477.*

Had the crab shell been a small piece of shell, we could understand how the plaintiff might be able to complain that he was not negligent. But he did not get the crab shell at Arnaud's, and if he had gotten it at any other place he certainly should have been able to know that he was swallowing a piece of crab shell as big as a half dollar.

CONCLUSIONS.

We submit that there is no evidence which could have warranted a jury in bringing in any verdict; that the excessiveness showed their prejudice; that the Judge of the lower Court reduced it but without evidence of a strong nature to show the defendant did serve a faulty

meal where the plaintiff had two meals on the same day, both of which could have caused the damage, than no verdict and judgment against defendant should be rendered; and that for the reasons urged in this brief the application for rehearing should be granted on the grounds in said application set forth.

For the reasons hereinabove set forth, we humbly urge that we be permitted to argue upon this application and that in this matter a rehearing should be granted, and that upon the rehearing hereof, the verdict and judgment of the lower Court should be reversed, at the cost of the appellee.

ROOS & ROOS
Attorneys for Appellant

By.....
Sidney G. Roos

CERTIFICATE OF SERVICE

We certify a copy of this application for rehearing and brief in support thereof has been mailed to opposing counsel by deposit in the ordinary mail the ____ day of _____, 1954.

ROOS & ROOS
Attorneys for Petitioner

By.....
Sidney G. Roos

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

No. 14,658.

ARNAUD'S RESTAURANT, INC., ET AL.,
Appellants,

versus

THOMAS P. COTTER, SR.,
Appellee.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

The petition of the LONDON GUARANTEE & ACCIDENT CO., LTD., insurer of Arnaud's Restaurant, defendant and appellant, with respect shows:

I.

The opinion and decree rendered in this cause on May 20, 1954 is erroneous and contrary to law and prejudicial to the interest of your peitioner; that a rehearing should be granted in this matter for the following reasons, to-wit:

1. The Court erred in not holding that the plaintiff and appellee, THOMAS P. COTTER, SR., was guilty of contributory negligence in swallowing a crab shell the size of a half dollar.

2. The Court erred in holding that the District Court was correct in not submitting to the jury the question as to whether or not the jury considered a crab shell in a dish of pompano en papillote a foreign substance.

3. The Court erred in holding, as a matter of law, that a crab shell in pompano en papillote was a foreign substance.

4. The Court erred in holding that the cases of *Doyle v. Fuerst & Kraemer, Ltd.*, 56 So. 906, and *LeBlanc v. Louisiana Coca Cola Bottling Company*, 60 So. 873, were decisive of the case at bar and were authority for the fact that the mere presence of a crab shell in a dish of pompano en papillote, a fish dish, was a violation of the implied warranty of wholesomeness.

5. The Court erred in holding that in this particular type of case where the dish was a fish dish that the mere presence of the crab shell made the defendants liable without submitting to the jury the question of whether there was any negligence.

6. The Court erred in not holding that the plaintiff and appellee's failure to use proer care in eating the dish was the proximate cause of his injury.

II.

Petitioner says it will file in connection with this petition a brief in support thereof and, for the reasons hereinabove set forth and amplified, a rehearing should be granted, and finally the judgment of this Honorable Court and the United States District Court for the Eastern District of Louisiana should be reversed.

WHEREFORE, petitioner, LONDON GUARANTEE AND ACCIDENT CO., LTD., prays that this Honorable Court grant a rehearing, and after a rehearing, reverse the lower court and grant a new trial.

Respectfully submitted,

RICHARD B. MONTGOMERY, JR.,
Attorney for Defendant-Appellant.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT, LONDON GUARANTEE & ACCIDENT CO., LTD. IN SUPPORT OF PETITION FOR REHEARING.

MAY IT PLEASE THE COURT:

It is submitted that there is no case in Louisiana which is authority for the position that this Court has taken in regard to the question of implied warranty by a restaurant owner. Neither the case of *Doyle v. Fuerst & Kraemer, Ltd.*, 56 So. 906, nor the case of *LeBlanc v. Louisiana Coca Cola Bottling Company*, 60 So. 873, have ever passed upon the question presented to this Court. In the *Kraemer* case, the restaurant owner was guilty of serving ice cream which had spoiled. Certainly in those days when there was no sufficient refrigeration there was a duty upon the restaurant owner to see that ice cream did not spoil. The same duty was placed upon him in regard to oysters and fish. He was the only one that had an opportunity to determine whether or not the food which he was serving was good or bad. Regardless of whether you called it an implied warranty of wholesomeness or negligence, when the dishes came out of the kitchen, he had the best opportunity to determine whether or not they were poisonous.

This is not the case in this particular instance. Here it was utterly impossible, as defendant-appellant has shown, for its insured, Arnaud's Restaurant, to have prevented this crab shell from being in the pompano en papillote or have discovered its presence. They used every precaution in the kitchen, and the one person who could have protected the plaintiff against injury was the plaintiff.

He had the last clear opportunity of preventing this injury to himself. To say that a man ate a fish dish which is known to have bones in it and could not have determined that there was a crab shell in it, proves, as we have said, that he was either drunk or negligent. This Honorable Court is extending in this case the doctrine of implied warranty, is beyond anything the Supreme Court or the Court of Appeals of Louisiana ever decided.

Respectfully submitted,

RICHARD B. MONTGOMERY, JR.,
Attorney for Defendant-Appellant.

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel on this the .... day of June, 1954.

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